No. (1)

Supreme Court, U.S.
FILED
04-866 DEC 13 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

GOKAL KAPOOR, ET AL.,

Petitioners,

v.

JOHN ASHCROFT, ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole issue presented in this case is whether the rape of an Afghan woman in the presence of her family by members of the Taliban militia on account of her religious beliefs constitutes severe and atrocious persecution as to warrant humanitarian asylum under 8 U.S.C. Section 1158 and 8 C.F.R. Section 208.13(b)(1)(iii)(A).

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Petitioners, Gokal Kapoor, et al., respectfully request that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Immigration Judge denied Petitioners' protection in the form of asylum pursuant to 8 U.S.C. 1158 on January 6, 1999. [Appendix A]

Petitioners filed a timely administrative appeal. The Board of Immigration Appeals dismissed the appeal on December 13, 2002. [Appendix B].

Petitioners filed timely motion to reopen and reconsider the Board of Immigration Appeals' denial of asylum. That motion was denied on August 5, 2003. [Appendix C].

Petitioners filed a timely petition for review of the denial of the motion to reconsider. On August 4, 2004, the Fourth Circuit Court of Appeals denied the Petition for Review. [Appendix D]

Petitioners filed a Petition for Rehearing and Rehearing En Banc. That petition was denied on October 5, 2004. [Appendix E].

GROUNDS FOR JURISDICTION

Petitioners were placed in removal proceedings in the Executive Office for Immigration Review, United States Department of Justice, United States Immigration Court for Arlington, Virginia. In an oral decision dated January 6, 1999, the Immigration Judge denied Petitioners' request to obtain protection in the form of asylum pursuant to 8 U.S.C. 1158. Petitioners appealed the Immigration Judge's decision

to the Board of Immigration Appeals pursuant to 8 C.F.R. Section 1003.1(b) on February 5, 1999. On December 13, 2003, Petitioners received a final order from the Board of Immigration Appeals, dismissing Petitioners appeal. Pursuant to 8 C.F.R. Section 1003.2(b), Petitioners filed a motion to reconsider the Board's decision on January 13, 2003. The Board denied the motion to reconsider on August 5, 2003.

The United States Court of Appeals for the Fourth Circuit took jurisdiction pursuant to 8 U.S.C. Section 1252(b)(9). Under this section, Congress authorized Circuit Courts within the jurisdiction of the Immigration Court to "[r]eview . . . all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any other action taken or proceeding brought to remove an alien from the United States . . " *Id.* The United States Court of Appeals for the Fourth Circuit denied Petitioners' Petition for Review in a decision dated August 4, 2004.[1] Petitioners filed a Petition for Rehearing and Rehearing En Banc on September 15, 2004 pursuant to Fed. R. App. P. 35(b). On October 5, 2004, the Fourth Circuit Court of Appeals denied the Petition for Rehearing and Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

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[1] The sole issue presented to the Fourth Circuit Court of Appeals was whether the BIA abused its discretion in denying the motion to reconsider. The case law is clear; if the BIA misapplies existing case law, denial of a motion to reconsider is an abuse of discretion. *Zhang v. INS* 348 F.3d 293 (1st Cir. 2003). Because the BIA issued an opinion in this case, the Fourth Circuit reviewed only the BIA's decision and not the Immigration Judge's opinion. *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 281 (4th Cir. 2004).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This petition for a writ of certiorari raises the issue of the interpretation of the concept of "severe" or "atrocious" persecution in the adjudication of a request for humanitarian asylum under 8 U.S.C. 1158 and 8 C.F.R. 208.13(b)(1).

STATEMENT OF THE CASE

The Kapoor family is from Afghanistan. They are Hindus. The Kapoor family entered the United States on June 17, 1997 by crossing the United States – Canada border without inspection. Upon entry into the United States, the Kapoor family filed an application for political asylum. On September 2, 1997, the then Immigration and Naturalization Service (INS) received the asylum application. Pursuant to 8 C.F.R. Section 208.14(c), the INS referred the asylum application to Immigration Court. Petitioners were placed in removal proceedings with the issuance of the charging document known as the Notice to Appear (NTA) dated January 12, 1998.

The Kapoor family, by and through counsel, conceded proper service of the NTA. The Kapoor family admitted the factual allegations contained in the NTA and conceded the charge of removability as set forth in the NTA. As a form of relief from removal, the Kapoor family requested protection in the form of asylum pursuant to 8 U.S.C. 1158; withholding of removal, pursuant to 8 U.S.C. 1231(b)(3) and voluntary departure, pursuant to 8 U.S.C. 1229b(a).

The crux of the asylum case is the severe and atrocious persecution the Kapoor family suffered at the hands of the Taliban in Afghanistan on account of their religious beliefs. The most compelling and horrific example

of persecution the Kapoor family endured occurred on October 15, 1996. On that day, about eight or nine members of the Taliban militia violently entered the Kapoor home. Inside the house, the Taliban militia severely beat the Kapoor family and forcibly raped Mrs. Kapoor in the presence of her family. The harm, including the raping of Mrs. Kapoor, occurred in the context of religious persecution.

The Taliban militia engaged in a pattern of religious persecution against the Kapoor family in particular and against Hindus in general. In the asylum application, which was sworn to and incorporated into Mr. Kapoor's testimony, Mr. Kapoor states:

As a religious leader/priest (Pujari), my family and I were under constant pressure to convert to Islam. My wife could not leave our house because she feared being harassed by the Taliban; while, my son could not attend school because the schools forced him to learn and practice Muslim religion. The situation became worse and worse with each passing day. We were forced to go to the Mosques and pray they way they wanted us to pray. I feared for our lives every day and night.

On October 15, 1996, the Taliban militia told Mr. Kapoor and his family to convert to Islam; they were told to go to the Mosque. When they refused:

[t]hey beat me up and raped my wife and took some belongings of the house and they said that they would come back.

The persecution endured by the Kapoor family was consistent with the treatment of the Taliban of its religious opponents. Amnesty International reports:

Scores of women were beaten in the streets for not wearing a *burqa* (a garment covering the body from head to foot with a small lace-covered opening for the eyes) or for exposing their ankles. In July, in the city of Farah, a woman named Turpeki was shot and injured by a teenaged *Taleban* guard with a car aerial because she let her veil slip a fraction. In another incident, a married couple who had come from Samangan province to Kabul to visit friends were stopped in the market. One *Taleban* guard slapped the woman in the face while another beat her husband severely. They were accused of being "un-Islamic" for planning to buy cosmetics.

In October, two Afghan nurses were reportedly beaten with a tree branch by a *Taleban* guard for not *burqas*. One of the women tried to run away. The guard forced her to the ground and held her between his legs while beating her with a stick

Before the fall of Kabul, reports of women being raped by armed guards of the government of then President Rabbani continued to be received but in almost all cases the perpetrators remained unpunished. In one instance, five guards belonging to the forces of Commander Massood reportedly abducted a nurse from Nazwana Clinic in the Shahr Nou District of Kabul in January and held her for about a week, subjecting her to repeated rape. J.A. 564

The Immigration Judge conducted an evidentiary hearing on the applications of relief from removal on June 24, 1998, October 2, 1998 and January 6, 1999. At the conclusion of the hearing, the Immigration Judge held that the Kapoor family was incredible and denied the forms of relief requested.

In a two-page decision, the Board of Immigration Appeals assumed that the Kapoor family testified credibly. The BIA stated in its December 13, 2002 decision, "Assuming *arguendo*, that respondents provided credible

testimony and established past persecution, we conclude that they do not have a well-founded fear of future persecution in Afghanistan on account of a protected ground." The BIA reasoned that while the appeal was pending, country conditions changed in Afghanistan and the Taliban is no longer in power.

The Kapoor family filed a motion to reconsider the Board's decision. In the motion to reconsider, the Kapoor family argued that even if a fundamental change in conditions has occurred, they are eligible for asylum as a consequence of the severe persecution they suffered at the hands of the Taliban militia. Specifically, in the motion, it was argued that the rape of Ms. Kapoor by the Taliban constitutes severe and atrocious persecution, which merits a grant of asylum even in the absence of a well founded fear of persecution. 8 C.F.R. 208.13(b)(1)(iii)(A).

The Board of Immigration Appeals disagreed. Although the BIA agreed that the rape of Mrs. Kapoor in the presence of her family "[w]as a horrific event," the level of harm inflicted on her and her family did not rise to the "severe" or "atrocious" standard to warrant the Kapoor family asylum in the absence of a well-founded fear of persecution.

The Kapoor family filed a Petition for Review to the Fourth Circuit Court of Appeals. On August 4, 2004, the Court of Appeals dismissed the Petition for Review. The Fourth Circuit held: "Kapoor failed to effectively establish the level of past persecution necessary to be eligible for a discretionary grant of asylum even if there is no reasonable likelihood of present abuse."

Believing that the horrific rape of Mrs. Kapoor in the presence of her family by the Taliban militia meets the criteria for severe or atrocious form of persecution, the

Kapoor family filed a Petition for Rehearing and Rehearing En Banc on September 15, 2004. The Fourth Circuit denied the request on October 5, 2004.

Petitioners now seek review by this Court.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED WHEN IT DETERMINED THAT THE RAPE OF MS. KAPOOR IS NOT SEVERE OR ATROCIOUS PERSECUTION

This matter presents a significant issue concerning the concept of "humanitarian asylum."[2] Refugees who suffered either severe or atrocious forms of persecution may be granted humanitarian asylum, even in the absence of a well-founded fear of persecution. It is generally believed that some acts of persecution are so inhumane that even if the government changes and there is little likelihood of future persecution, the refugee may be inclined not to return because of the severity of the persecution the refugee suffered. *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). Under the principles of humanitarian asylum, the refugee must prove that the persecution he or she suffered meets either a "severe" or "atrocious" persecution standard.

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[2] Under the statute and governing regulations, there are three methods a refugee can obtain protection in the form of political asylum. First, if the refugee possesses a well-founded fear of persecution. Second, if the refugee suffered past persecution and country conditions have not changed. In that case, the refugee will be presumed to possess a well-founded fear of persecution. Third, a refugee may obtain protection in the form of asylum under the concept of "humanitarian asylum." 8 C.F.R. Section 208.13(b)(1)-(2).

In this Writ, the Kapoor family submits that the harm inflicted against them by the Taliban militia – the rape of Ms. Kapoor in the presence of her family because of their religious beliefs - meets the standard of "severe" or "atrocious" persecution. As such, they should be granted humanitarian asylum in the exercise of discretion.

This Court is asked to resolve a conflict between the Circuits. The Third, Seventh and Ninth Circuit Court of Appeals opine that any victim of rape, per se, suffers "severe" or "atrocious" persecution and should be granted asylum in the exercise of discretion, even in the absence of a well-founded fear of persecution. *Lopez –Galarza v. INS* 99 F.3d 954, 962-64 (9th Cir. 1996); *Brucaj v. Ashcroft* 381 F.3d 602, 610 (7th Cir. 2004); *Zubeda v. Ashcroft*, 333 F.3d 463 (3rd Cir. 2003).

In this case, the Fourth Circuit Court of Appeals disagreed and held that the violent and horrific rape of a woman on account of her religious beliefs does not constitute severe or atrocious persecution. The Kapoor family requests this Court to follow the commonsense rulings of the Third, Seventh and Ninth Circuit and hold that rape per se is a severe and atrocious form of persecution, which warrants protection in the form of humanitarian asylum.

Asylum adjudication is governed by 8 U.S.C. 1158. Under this section, the Attorney General has the authority to grant an alien asylum in the United States if the alien meets the criteria of a "refugee" as that concept is defined in 8 U.S.C. 1101(a)(42) and the alien merits favorable exercise of discretion. 8 U.S.C. 1158(b)(1).

A "refugee" is defined as "any person who is outside any country of such person's nationality. . . and who is unable or unwilling to return, and is unable or unwilling to avail himself or herself of the protection of, that country because

of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . "

As the definition of a "refugee" makes it abundantly clear, two classes of aliens qualify for asylum, those who suffered persecution or who possess a well-founded fear of persecution.

Consistent with the statute, the regulations permit aliens who suffered persecution to obtain asylum in the United States. Under 8 C.F.R. Section 208.13, aliens who suffered persecution are presumed to possess a well-founded fear of persecution. 8 C.F.R. Section 208.13(b)(1). The administrative presumption may be rebutted if the Immigration Judge makes a finding that country conditions have fundamentally changed to such an extent that the alien no longer possesses a well-founded fear of persecution. *Id.*

In cases where country conditions have fundamentally changed and the alien no longer possesses a well-founded fear of persecution, asylum may still be granted in the exercise of discretion if the alien "[h]as demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution." 8 C.F.R. Section 208.13(b)(1)(iii)(A).

In *Matter of Chen*, the Board first enunciated the standard and criteria for asylum adjudication in the absence of a well-founded fear of persecution. 20 I&N Dec. 16 (1989). In *Matter of Chen*, the Board held:

[t]here may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution. That victims of past persecution should in some cases be treated as refugees or asylees even when the likelihood of future persecution may

not be great has been recognized by the Office of the United Nations High Commissioner for Refugees in *The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1988). There, referring to a "general humanitarian principle," it is written:

It is frequently recognized that a person who – or whose family – has suffered atrocious form of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitudes of the population, nor in view of his past experiences, in the mind of the refugee.

Mater of Chen at 19.

The Board's decision in *Matter of Chen* was adopted recently in *Matter of N-M-A-*, 22 I&N Dec. 312, 325-326 (BIA 1998). In *N-M-A-*, the Board held that aliens who suffered severe or atrocious forms of persecution are eligible for asylum, even in the absence of a well-founded fear of persecution. *Id.*

Rape meets the threshold "severe" or "atrocious" requirement set forth in *Matter of Chen* and *Matter of N-M-A-*. The Taliban's violent rape of Ms. Kapoor is per se a horrific event, which meets this "severe" or "atrocious" standard. It is argued in this Writ that rape per se is severe or atrocious form of persecution. In fact, it is difficult to fathom a fact pattern where the victim of a violent rape would not be humiliated, abused and severely scarred, both physically and psychologically.

This case presents more aggravating factors, however. Not only was Ms. Kapoor raped, but she was raped in front of her family. Ms. Kapoor's husband and children

were present and witnessed the Taliban inflict such horrible and repugnant punishment. To further aggravate the severity of harm inflicted against Ms. Kapoor, the rape occurred as a means to convert her religious beliefs from Hindu to Muslim. Thus, her deeply held religious beliefs – her sense of being – was the qualifying characteristic which exposed her and her family to such brutality.

Typically, a claim of asylum arising out of the Board's decision in *Matter of Chen* requires the Immigration Judge to give a "clear" explanation of whether the persecution suffered rises to the level of severe or atrocious.[3] "The need for a clear explanation of the immigration judge's decision is particularly important in *Chen* cases 'because the BIA acknowledged that it was not 'attempting at this time to delineate the circumstances under which past persecution may or may not be the basis for a successful asylum claim.'" *Rodriguez-Matamoros v. INS*, 86 F3d 158, 161 (9th Cir. 1996), quoting *Matter of Chen* at 21.[4]

Neither the BIA nor the Fourth Circuit Court of Appeals minimally attempted to explain why they believed

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[3] In this case, the Immigration Judge did not adjudicate the application for asylum under *Matter of Chen* because when the application was before the Immigration Court, the Taliban remained in power. In *Matter of Chen*, the Board created the concept of humanitarian asylum in cases of changed country conditions.

[4] The extent or the "clear" statement from the Board regarding the Kapoor family's claim of severe persecution is that although the rape was "horrific" it did not rise to the level of "severe" or "atrocious" persecution to trigger a *Matter of Chen* finding and grant the Kapoor family humanitarian asylum. In a cursory and dismissive manner, the Fourth Circuit Court of Appeals simply, and without distinguishing this case from the sister circuits' decision, held: "Kapoor failed to effectively establish the level of past persecution necessary to be eligible for a discretionary grant of asylum even if there is no likelihood of present abuse."

that Mrs. Kapoor's rape in the presence of her family does not rise to the level of "atrocious" or "severe" persecution, which would trigger a finding of humanitarian asylum. In fact, the BIA's and the Fourth Circuit's decision lacks such a degree of commonsense – that is holding rape is not a severe or atrocious form of persecution – that neither decision can withstand serious review from this Court.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT COURT OF APPEAL'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS FROM THE THIRD, SEVENTH AND NINTH CIRCUITS.

The issue of whether rape constitutes "severe" or "atrocious" form of persecution has been presented to the various administrative and federal tribunals. Except for the Fourth Circuit's opinion in this matter, the federal circuits are in agreement that rape constitutes severe or atrocious persecution. The leading case on the issue of whether rape is per se an atrocious form of persecution is the Ninth Circuit's decision in *Lopez-Galarza v. INS*. In that case, the Ninth Circuit held:

Rape at the hands of the government authorities while imprisoned on account of one's political views can be atrocious form of punishment indeed. The severity of the harm of rape is underscored by the numerous studies revealing the physical and psychological harms rape causes. A recent article in the *Journal of the American Medical Association* summarizes several studies of the effects of rape and concluded:

Rape commonly results in severe and long-lasting psychological sequelae that are complex and shaped by the particular social and cultural context in which the rape occurs. . . Commonly reported feelings at the time of the

rape include shock, a fear of injury or death that can be paralyzing, and a sense of profound loss of control over one's life. Longer-term effects can include persistent fears, avoidance situations that trigger memories of the violation, profound feelings of shame, difficulty remembering events, intrusive thoughts of abuse, decreased ability to respond to life generally and difficulty reestablishing intimate relationships.

Lopez –Galarza v. INS 99 F.3d 954, 962-64 (9th Cir. 1996).

The Seventh Circuit followed the Ninth Circuit's holding in *Lopez-Galarza*. In *Brucaj v. Ashcroft*, the Seventh Circuit held:

[t]he BIA may have meant that the brutal rape, beating and abandonment experienced by Ms. Brucaj was not "atrocious" enough to warrant a grant of humanitarian asylum. If this view is the basis for the Board's denial of relief to Ms. Brucaj, further explanation by the BIA regarding how Ms. Brucaj's experiences differ materially from other cases in which humanitarian relief has been granted is necessary. This is especially true given that the "severe and long-lasting" effects of rape are well-documented and are similar to those experienced by torture victims. *See Lopez-Galarza v. INS*, 99 F.3d 962-964 (9th Cir. 1996).

Brucaj v. Ashcroft 381 F.3d 602, 610 (7th Cir. 2004).

The Third Circuit is in agreement. In *Zubeda v. Ashcroft*, 333 F.3d 463 (3rd Cir. 2003), the Third Circuit held that "severe pain and suffering [is] endemic to rape." "Rape is a form of aggression constituting an egregious violation of humanity." As the Third Circuit correctly stated, "The effects of rape appear to endure for months or even years. One study found that twenty-six percent [of the rape survivors studied] felt that they had not recovered four to six

years after their rapes." *Zubeda v. Ashcroft*, citing *Lopez-Galarza v. INS*. *Zubeda* at 473.

The effects suffered by rape victims are well documented. Rape is a traumatic experience for a woman. The Ninth Circuit in *Lopez-Galarza*, citing the AMA details the traumatic scars of rape on women. This reasoning is followed in *Brucaj*. In an article published by Georgetown Law Journal, the author analyzes the aftermath of rape on women and concludes that many rape victims are isolated from their communities. Rape survivors "[a]lso experience isolation in their intimate relationships. Rape transforms an 'act that physically and symbolically indicates communion. . . into combat. . . Rape asserts only combat, brutalizing the communal aspect of sexuality, destroying meaning, relationship and person . . '" Id. at 1942. See, *84 Geo. L.J. 1913, 1939-1942* (1996).

The incident of October 15, 1996 is vividly described in the asylum application and the testimony. In the asylum application, Mr. Kapoor states:

Between 11pm-12am, on October 15, 1996, 8-9 members of the Taliban/Mujahadin attacked our home. I begged them not to hurt our family and offered them everything we had – my wife's jewelry and our savings for our son. They raped my wife. When I screamed and begged for help, they tied my hands and put me in a corner of the room. They burned my hands with a cigarette to force me to keep quiet. J.A. 627.

Ms. Kapoor tells an equally frightening story. She recalls the intruders covering their faces with dark clothes. In her words:

[T]hey were inside my house. They beat me up; they beat up my husband; and they beat up my little child and they were, I was screaming. There was so much noise in the house. I was

screaming for help and telling everyone to help me out. But there was no such thing going on there. Nobody was helping me and they were trying to rape and that time I lost control and I didn't know what happened. I just fell down. J.A. 317.

The rape of Ms. Kapoor by the Taliban militia meets the severe or atrocious persecution test set forth in the regulations and the case law. The long-lasting effects of rape are well documented in the case law. Women who are victims of rape have long lasting physical and psychological scars. In most cases, the scar lasts years after the rape occurs. Lopez-Galarza at n. 10. The practical effects of rape include unwanted pregnancies, rejection from the family and being ostracized from the community. As such, it stands to reason that a woman who was the victim of a brutal rape was either severely or atrociously persecuted.

CONCLUSION

This matter presents a significant issue concerning the concept of humanitarian asylum. As the Fourth Circuit has held, the stakes involved in an asylum application are of the utmost importance; the stakes are the adjudication of "human rights." *Selgeka v. Reno* 184 F.3d 337, 345 (4th Cir. 1999).

The Fourth Circuit's decision in this case shocks the conscience. The atrociousness and severity of rape is well-documented in the medical literature. Women who are victims of these violent and brutal attacks suffer physical and psychological damage. Ms. Kapoor's most intimate and private of human experience was violently violated by a group of religious zealots. This brutal violation occurred in front of her helpless family. The repugnant act of raping Ms. Kapoor in front of her family meets the threshold set forth in *Matter of Chen*.

Wherefore, for the reasons articulated above, Petitioners Gokal Kapoor, et al. request of this Court that it grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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No._____

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JOHN ASHCROFT, ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Washington, D.C.

File No.: A 75 394 627/628/629
In the Matter of)
)
GOKOL CHAND KAPOOR,)
SHEILAKAPOOR &)
NISHANT CHAND KAPOOR)
)
Respondents)

CHARGE: Section 212(a)(6)(A)-(i) of the Immigration & Nationality Act - Alien present in the United States who has not been admitted or paroled.

APPLICATION: Asylum, withholding of removal

ON BEHALF OF RESPONDENT:

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ON BEHALF OF SERVICE

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ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents are a family, husband, wife and son who are natives and citizens of Afghanistan. They entered the United States on June 16, 1997 using phony documents. The time they entered through Dulles Airport and went to an inspection but did not present documents which related to themselves and therefore the inspection was faulty in regard to their identity. They have conceded that they are subject to removal as charged. Based on that concession we find that they are subject to removal as charged.

The respondent's renewed an asylum application which was filed by the husband and received by the INS for processing on September 2, 1997. The application was referred to the Court after an interview of. the principle applicant on December 11, 1997. The female respondent and child seek to be included as dependents. There is no marriage certificate to establish the marital relationship of the female respondent or benefits under the law as a dependent spouse. According to the husband's testimony there was no procedure in Afghanistan for registering their marriage. They were Hindus in a Muslim country. Well they testified that no type of certificate was issued by the Government. They have applied and been issued a marriage in Virginia so that they could go through a local marriage and have a marriage certificate but there was testimony from the husband that he explained at the marriage license bureau that he was already married to the female respondent and that he understood that the marriage could not be formed in the United States if a person was already married. However, the marriage license was issued so it appears that they could go through a marriage ceremony in Virginia. He has not discussed the matter with counsel to get the advice of counsel on the matter.

The Service has informed us that it has not received FBI reports in this case because the respondent's fingerprints have never been sent to the FBI. While the INS has fingerprints for the adult respondents, it has not yet sent them and has now instituted a new procedure whereby fingerprinting has to be done at an INS facility. The respondents have not yet obtained fingerprinting at the INS facility.

We are proceeding to decision on the left because it is our conclusion that the application should not be granted. Therefore, there would be no purpose served in continuing the case for the respondents to obtain of their relationship or fingerprinting results.

Section 208 of the Immigration & Nationality Act provides for asylum for persons who fit the definition of refugee. A refugee is defined in the Act as an alien unwilling to return to this or her country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. From hereon when we refer to the respondent we shall be referring to the male respondent as the primary applicant for asylum. It is contended that the respondent has been persecuted already and also that he has a well founded basis to fear persecution on account of his religion. According to the- testimony the respondent is a who lived in Kabul Afghanistan where he had a business until October of 1996. The respondent testified and the evidence reflects that in September of 1996 the Taliban militia forces took the city of Kabul. About a month later according to the testimony, a number of armed individuals black turbans came into their home, beat up all three family members and sexually assaulted possibly the female respondent. Both the male respondent and the female respondent testified that they passed out during the course of the beating and do not know what actually occurred as far as

any sexual assault or rape of the female respondent. However, they fear that such an event did take place. The account of the female respondent who testified today provided a somewhat different impression of the assault than the testimony of the male respondent. According to the male respondent he is certain that the assailants were members of the Taliban armed forces because of their appearance and dress style including the black turban which he testified is associated with the Taliban. He testified that the reason for the beatings and assault was to persuade him to convert to the Muslim religion. He testified that he was told that he should recite a particular Muslim prayer and that he should accompany the assailants to a Mosque. From the male respondent's description of the events it is not entirely clear whether he was beaten after he refused to go to the Mosque or whether the beating were first or were at the same time as the demands that he convert to the Muslim religion and go to the Mosque. The description provided by both respondents is that the assailants came in started beating the male respondent until he was physically disabled from helping the female, that they beat the child and that they then beat the female respondent. It is not clear that the respondents were all within the same room of each other during these beatings. The female respondent testified that they had a large house and that they kept from one side to the other during the course of the assault. The female respondent did not report hearing any demands on her husband that he convert to the Muslim religion or that he accompany them to a Mosque or that he must recite a particular Muslim prayer. She testified that the persons appeared to be thieves because she associated black cloth on the face, covering the mouth as a sign that the people were thieves. She also testified that when people come in the middle of the night such people are always, thieves. She testified that the assailants were stealing things from the family. She testified that they came late at night. The male respondent testified that the assailants arrived about 11 p.m.. and were gone by about 4 a.m.

From the female respondent's account of the assault it does not appear to have been related to any religious motivation or desire to punish them because of their religion. The male respondent's testimony is to just of a religious motivation. Given the discrepancy and the testimony presented we must agree with the Government that the respondents have not on their burden to establish by a preponderance of the evidence that the motivation for the attack was based on their religion in part. The female respondent did not observe any motivation related to their religion.

We must evaluate this case also in the context of the fact that the male respondent admitted to me today in his testimony that he gave false testimony at a prior hearing in order to protect his sister. He did not want to involve his sister in his case. It is also the fact that the context of this case arises on one of which the parties engaged the services of a smuggler at a high cost, of $5,000 U.S. equivalent to provide them smuggling services which included coming into the United States and false identities were from false documents. The smuggler after successfully bringing them into the United States apparently arranged for them to stay in a hotel where they were met, according to today's testimony, by the respondent's sister who transported them from New York to Virginia.

A discrepancy in the testimony arose between the respondent and the sister because he testified when originally asked how he got from New York to Washington, that the family took a bus. The sister of the respondent then testified on his behalf and testified that she had collected the respondent in New York. The sister appeared to be giving false testimony on the stand. From her demeanor we noticed that her lower jaw was quivering. She was slow to answer and her answers were particularly soft regarding the

testimony about the respondents arrangement and the contact between them particularly related to collecting them in New York. According to the respondent's sister and her testimony the respondent had no contact with his brothers in the United States in advance of arrival. According to the respondent during his testimony, he came to the United States pursuant to the advice of a brother in the United States. It appears that the family is trying to protect the smugglers and also trying to avoid involving the U.S. citizen family members from appearing to be involved in any way with the violation of the immigration laws. The respondent has a brother who is a doctor in Pittsburgh, who has sent a letter which was received into evidence today. See Exhibit 10-A. But the brother was unwilling to come to court apparently to be a witness and subjected to cross-examination in the case. Given the large sum of money paid for the smuggling and the fact that the respondent claims that he came to the United States on the advice of a brother we suspect that the U.S. citizen relatives did have some role in respondent's arrangements to enter the United States with the use of a smuggler. In any event we are being presented with what appears to be clearly false testimony by the respondent and his witnesses at times. In fact, as mentioned, the respondent has admitted today that he did give false testimony out of a desire not to involve his sister in anything illegal in regard to the immigration law. Another factor regarding misrepresentations that have been presented in this case is the fact that the respondent presented a letter of support from a priest. Exhibit 5-27, which the respondent himself disavows. He claims that the contents of the letter are inaccurate where the letter states that he and his wife "have a strong belief in the Sikh religion" and that their "parents and ancestors . . . practice Sikh religion for years." Respondent testified that his parents never practiced the Sikh religion and that he would not describe himself as having a strong volition of Sikh religion. The maker of the letter was the Head Priest of a Sikh congregation in Fairfax, Virginia. The

Immigration Service attorney indicated an interest in cross-examining the maker of the letter. However, the maker of the letter refused by a letter dated December 11, 1998 to attend the hearing. See Exhibit 9.

This case therefore involves numerous misrepresentations that have been made in connection with both this application for relief and in connection with securing admission to the United States. These factors cast an important question as to the voracity of the male respondent when he in his testimony claims that there was mention made during the assault on his house of his religion. We note that his own testimony is not supported by his wife in regard to that factor. We realize that it could be concluded that the wife simply didn't hear what the husband heard. However, the wife's impression of the assailants does not accord with that of her husband. She testified that she had no information as to the identity of the assailants as far as whether they were part of a group of some type or whether they were of a particular religion or as to their specific identities.

Furthermore, there is no evidence in this record that the Taliban engaged in rape as a method to punish persons who do not practice their fundamentalist brand of the Muslim religion. The record does contain considerable evidence about various atrocities that have been committed by the Taliban since it came into power. Rape is not one of the ones mentioned in the record. In fact, the background evidence suggests that the Taliban is very moralistic in regard to sexual matters.

There is no evidence in this record to corroborate the respondent's claim that Hindus are being mistreated under the Taliban regime because of their religion. We have a report from the State Department which states that their office has not "received any reports as to how the Taliban

forces which took control of Kabul last September 1996, are treated Sikhs and Hindus in that city." Exhibit 4, pages 1 and 2. The report goes on to state that the U.S. team visited a different province, Gazni Province in early April of 1997 and reported that Sikhs in that Province stated that their community was enjoying generally good relations with the Taliban and that there were about 50 Sikh families in that Province who lived in the capital City of Gazni. Respondent does not claim to be a Sikh nor does he claim to have lived in Gazni Province. The State Department Report, Exhibit 4-A, is dated September 15, 1997. It was a specific response to the respondent's application. A profile of asylum claims dated May 1998 has also been received in this case. See Exhibit 4, and it contains similar information. Page 5 goes on to state "in view of the confused and volatile situation in Afghanistan today there is very little reliable information on how the remaining members of the religious minority maybe fairing. They go on to state that some Hindu families return to claim properties left behind in the 1992, '93 exodus. But they don't know how many were involved and that returned. The background material does indicate that there was specific problems which occurred in 1992 and '93 when the Muja Hadim factions had control. It states by the end of 1992 and early 1993 Kabul's Hindu community joined thousands of Afghan Muslims who fled the country to escape the renewed civil war and that as a result there are few Hindus left in Kabul at this time. It describes a tax on Hindus which occurred before that and states that the Muja Hadim probably were motivated by religious seal, believing that the proper of "unbelievers" was actually theirs for the taking. Then interim appeal for religious toleration and the looting gradually came to an end. This same report mentions that many Hindus were cospus merchants to respondent and the female respondent both testified that they fit that category. The Muja Hadim entered Kabul in April of 1992 and that is when there was widespread looting of some places of business until there was a call for religious toleration. The

respondent does not claim to have any problem during the period that the Muja Hadim had control of Kabul. His problem occurred after the Taliban took control of Kabul. The female respondent testified that she did not know whether the persons who came into her home were Taliban or Muja Hadim or neither.

According to the male respondent the assault on his family occurred on October 15, 1996. While he initially testified that his wife was raped. Today he testified that he could not see exactly step by step what happened to his wife that he had passed out and also that he was being subjected to so much beating that he couldn't really focus on what else was happening.

It is our conclusion from the testimony in this case that the respondents were the victims of an assault on their home in Kabul on October 15, 1996. We also find that they are natives and citizens of Afghanistan as charged. We cannot find from the testimony offered in the record of this case that they have established that the assault on them took place on account of their religion or as a result to punish them on account of their religion. Accordingly, we do not find that they have suffered past persecution on account of their religion.

We turn then to their claim that they have a well founded basis to fear persecution in Afghanistan because of their religion. There is no evidence here that the Taliban is mistreating Hindus because of their religion. The State Department indicates it has no information on the subject. The respondents appear to have no information on the subject either.

They appear to have left Afghanistan because of danger. The fact that they experienced the type of violence in their home that they experienced would give them a reason to fear

that Kabul was a dangerous place. We can understand their wanting to leave because of general danger from people that come into their home and assault them and steal things from them. But there is no evidence here that this is a crime because of religion, nor is there evidence that they have a well founded basis to fear this on account of their religion. We recognize that there is a very small number of persons of their religion presently in Kabul and that that is a phenomenum that happened as a result of the civil war which has been going on in that country for many years.

There's background information here that the Taliban engaged in treatment that we in the west would be the mistreatment of women. It is not the female respondent who is the primary applicant here. It is the male respondent. The problems that the females have in Afghanistan currently under the Taliban relate largely y to not being provided educational and employment opportunities and being required to stay at home and dress in a particular way. The female respondent testified that she already, pursuant to local custom and her husband corroborated just stayed home and did not work and she testified also that she was not educated. Thus, it does not appear to be anything about the Taliban's kind of treatment of women that would be particularly offensive to the female respondent and given her own choice of lifestyle. In any event, that's even if were the applicant, or her problems could be considered the basis for the husband's application, they would not be able to prevail on the basis of this record.

Having found that the respondents have not established by a preponderance of the evidence that they have a well founded basis to fear persecution in Afghanistan, it follows that they do not have a clear probability of persecution which requires a higher standard of proof. INS v. Stevic, 467 U.S. 407 (1984) and See INS v. Cardoza Fonseca, 480 U.S. 41 (1987). A clear probability of persecution which is a higher standard

of proof and a well founded fear must be shown to qualify for withholding of removal. The respondent's not only have made out the lesser standard of proof have not made out the greater standard of proof.

The respondents do not qualify for the relief of voluntary departure in the alternative because they were not in the United States for a full year at the time that their notices to appear had been issued. Accordingly, we cannot consider that alternative in this case.

ORDER

IT IS ORDERED that the respondent's application for asylum and withholding of removal be denied.

IT IS FURHTER ORDERED that the respondents be removed from the United States to Afghanistan on the charge contained in the charging document.

_____

Joan Churchill
Immigration Judge

U.S. Department of Justice
Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk
5201 Leesburg Pike, Suite 1300 Falls Church, Virginia 22041

Cherkasky, Clare, Esquire
5622 Columbia Pike, Ste. 203
Falls Church, VA 22041

Office of the District Counsel/WA
4420 N. Fairfax Drive, Room 500
Arlington, VA 22203
Name: KAPOOR, GOKAL CHAND *
A 75-394-627 Riders: 75-394-628 75-394-629

Date of this notice: 12/13/2002

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Jeffrey Fratter Chief Clerk

Enclosure

Panel Members:
BRENNAN, NOEL A.

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

Date: December 13, 2002
Files: A75 394 627 - Arlington
A75394 628
A75 394 629

C 13 2002

In re: GOKAL CHAND KAPOOR SHIELA D. KAPOOR
NISHANT CHAND KAPOOR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Simone P. Jones, Esquire

ON BEHALF OF SERVICE: Graciela Vazquez de Schwartz
Assistant District Counsel

CHARGE:

Notice:Sec.212(a)(6)(A)(i), I&N Act [8 U.S.C: § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (all respondents)

APPLICATION: Asylum; withholding of .removal; protection under the Convention Against Torture

ORDER:

PER CURIAM. The respondents appeal from the January 6, 1999, decision of the Immigration Judge denying their application for asylum and withholding of removal under sections 208(a) and 241(b)(3).of the Immigration and. Nationality Act, 8 U.S.C. §§ 1158(a), 1231(b)(3). The appeal is dismissed.

On appeal, the respondents, natives and citizens of Afghanistan, claim that they credibly. established past persecution in Afghanistan on account of their religion by the Taliban. Assuming, *arguendo,* that the respondents provided credible testimony and established past persecution, we conclude that they do not have a well-founded fear of future persecution in Afghanistan on account of a protected ground. *See 8* C.F.R. § *208.13(b)(1)(i)(A)* (2002). While the respondents' appeal was pending before us, the Taliban was removed from power in Afghanistan. *See* Bradley Graham, *Unfinished Business in Proxy War,* Wash. Post, Jan. 6, 2002, at Al; Kevin Sullivan, *Afghan Leaders' Limited Goal: Proving They Can Cooperate,* Wash. Post, Dec. 30, 2001, at A20; *see also Matter ofR-R-, 20 I&N* Dec. 547,551 (BIA 1992) (recognizing the power of administrative agencies to take, administrative notice of commonly-known facts). While we recognize that conditions in Afghanistan remain unstable, a fear of generally violent country conditions is an insufficient basis for an asylum application. *See:Matter of Mogharrabi,* 19 I&N Dec. 439,447 (BIA *1987).*

Based on the foregoing, the appeal is dismissed.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration
Appeals Office of the Clerk
5201 Leesburg Pike, Ste 1300
Falls Church, VA 22041

LEVINE, SAMUEL JAY, ESQUIRE
4001 N. 9th STREET
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ARLINGTON, VA 22203

Office of the District Counsel/WA
4420 N. Fairfax Drive, Room 500
Arlington, VA 22203

Name: KAPOOR, GOKAL CHAND *
A75-394-627 Riders: 75-394-628 75-394-629
Date of this notice: 08/05/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Jeffrey Fratter

Jeffrey Fratter Chief Clerk

Enclosure

Panel Members:
HURWITZ, GERALD S.

U.S. Department of Justice .
Executive Office for Immigration Review

Date: August 5, 2003

Decision of the Board of Immigration Appeals

Files:
A 75 394 627 – Arlington
A 75 394 628
A 75 394 629

In re: GOKAL CHAND KAPOOR
SHEILA D. KAPOOR
NISHETA CHAND KAPOOR

ON BEHALF OF. RESPONDENTS: Samuel J. Levine, Esquire

ON BEHALF OF DHS: Graciela Vazquez de Schwartz
Assistant District Counsel

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)] - Present without being admitted or paroled (all respondents)

APPLICATION:. Reopening

This matter was last before the Board on December 13, 2002, at which time we dismissed the respondents' appeal from the Immigration Judge's decision denying their applications for asylum and withholding of removal under sections 208(a) and 241(b) of the Immigration and Nationality Act, 8. U.S.C. §§ 1.158(a), 1231(b)(3). The respondents have filed a, motion to reconsider and to reopen

for consideration of additional evidence. The motion will be denied.

The respondents argue that the Board erred in overlooking an October 18, 1999, psychological evaluation of thee female respondent that was submitted. with their appeal brief, and in declining to consider a' discretionary grant of asylum under *Matter of Chen, 20 I&N* Dec. 16 {BIA 1989). In addition, the respondents move to reopen to consider a confidential psychological report of the female respondent dated January 16, 2003.

With respect to the new evidence submitted on appeal and in conjunction with the instant motion. to reopen, we find that this evidence could have been presented at the hearing before the Immigration Judge. *See 8* C.F.R. § 1003.2(c). (providing that a motion to reopen shall be supported by new evidence that is material and was not available and could not have been discovered or presented previously). The reports discuss the psychological effects on the female respondent of her 1996 rape by members of the Taliban in Afghanistan. The notice to appear was served on the respondents on January 2,1998, and the Immigration Judge. issued her oral ruling a year later on January 6, 1999.

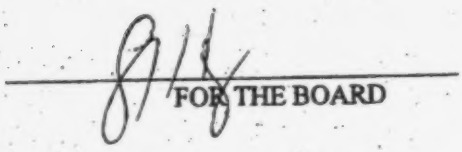
Because the respondent does not state that these psychological reports could not have been prepared and presented during the proceedings before the Immigration Judge, we decline to reopen proceedings for consideration of this additional evidence. *See* 8 C.F.R. § 1003.2(c)..

We also decline to reconsider the Board's December 12, 2002, decision dismissing the respondents' appeal. In that decision, the Board assumed that the respondents had provided credible testimony and had established past persecution, but concluded that they do not have a well-founded fear of future persecution in Afghanistan based on

current country conditions.. While we agree that the female respondent's rape in the presence of her family was a horrific event, we nevertheless conclude that the circumstances of this case do not warrant a discretionary grant o asylum in the absence of a well-founded fear of future persecution. *See Matter of Chen, supra.*

Accordingly, the motion will be denied.

ORDER: The respondents' motion is denied.



FOR THE BOARD

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2030

GOKAL CHAND KAPOOR,

versus

JOHN ASHCROFT, Attorney General,

Petitioner,

Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. (A75-394-627)

Submitted: July 12, 2004

Decided: August 4, 2004

Before WILKINSON, MOTZ, and TRAXLER, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Ivan Yacub, LAW OFFICE OF IVAN YACUB, Falls Church, Virginia, for Petitioner. Peter D. Keisler, Assistant Attorney General, Linda S. Wendtland, Assistant Director,

Elizabeth J. Stevens, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Gokal Chand Kapoor appeals the Board of Immigration Appeals' ("Board") order denying his motion to reconsider and to reopen. To the extent Kapoor seeks to challenge the Board's December 18, 2002, order dismissing his appeal from the immigration judge's decision, we note Kapoor did not file a timely petition for review from that order. See 8 U.S.C. § 1252(b)(1) (2000); Stone v. INS, 514 U.S. 386, 394, 405 (1995).

This Court reviews the Board's denial of a motion to reopen or a motion to reconsider for abuse of discretion. 8 C.F.R. § 1003.2(a) (2004); INS v. Doherty, 502 U.S. 314, 323-24 (1992); Yanez-Popp v. INS, 998 F.2d 231, 234 (4th Cir. 1993) . Such motions are especially disfavored "in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." Doherty, 502 U.S. at 323. We find the Board did not abuse its discretion in denying the motion to reopen on the basis it was not shown that the new evidence could not have been submitted in the proceedings before the immigration judge. Onyeme v. INS, 146 F.3d 227, 234 (4th Cir. 1998). We further note the Board did not abuse its discretion in denying the motion to reconsider. Kapoor failed to effectively establish the level of past persecution necessary to be eligible for a discretionary grant of asylum even if there is no reasonable likelihood of present abuse.

Accordingly, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-2030 A75-394-627

FILED October 5, 2004

GOKAL CHAND KAPOOR

Petitioner

V.

JOHN ASHCROFT, Attorney General
Respondent

On Petition for Rehearing and Rehearing En Banc

The petitioner's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Wilkinson, Judge Motz, and Judge Traxler.

For the Court,

/s/ Patricia S. Connor

CLERK